SUPREME COURT, U. S.
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No. 75-1444

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. JOYCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his conviction was improper because his absence during the last day of trial, although in accordance with his written waiver, was in fact involuntary.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on several counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to one year's imprisonment on one count, fines totalling $5,000, and five years' probation on another count. The court of appeals affirmed the convictions (except on one count, which it reversed for insufficiency of the evidence), *United States* v. *Joyce*, 499 F.2d 9 (C.A. 7), and this Court denied certiorari, 419 U.S. 1031.

Petitioner subsequently sought to have his conviction vacated pursuant to 28 U.S.C. 2255. The district court

dismissed the petition (Pet. App. B) and the court of appeals affirmed (Pet. App. A).

Petitioner's sole contention[1] is that the trial court violated former Rule 43, Fed. R. Crim. P. (1973 ed.),[2] and the Sixth Amendment, by proceeding with the last day of trial in petitioner's absence. He argues that despite his execution of a written waiver of his presence at the trial, which his attorney presented to the trial court, his absence was involuntary because he was hospitalized with a severe illness (Pet. 4).

Petitioner did not request a continuance of the trial or raise this issue in post-trial motions or on direct appeal. Accordingly, the courts below correctly concluded that petitioner deliberately by-passed the prescribed trial, post-trial, and direct-appeal procedures, and therefore was precluded from litigating the issue on collateral attack (Pet. App. A 2a-3a; Pet. App. B 6a). *Kaufman* v. *United States*, 394 U.S. 217, 227, n. 8. Cf. *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976, slip op. 9-12.

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[1]The facts underlying petitioner's convictions, set forth in the court of appeals' first opinion (499 F.2d at 13-14), are not in dispute. Petitioner and his three co-defendants (who either were convicted of or pleaded guilty to mail fraud) defrauded insurance agents and brokers, certain state insurance departments, and individuals who purchased insurance policies from Global Surplus and Excess Limited, by substantially misrepresenting that company's assets. They also illegally converted funds deposited in various checking acccounts which had been opened for the protection of Global policyholders.

[2]Former Rule 43 provided, in pertinent part:

> The defendant shall be present * * * at every stage of the trial * * * except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. * * *

In any event, the facts show, and petitioner admits (Pet. 4), that he executed a written "waiver of his being present" at the last day of trial.[3] As the court of appeals noted, the waiver "was presented to [petitioner] by his seasoned counsel who witnessed the signature" (Pet. App. A 2a), and then to the district court. Petitioner never requested that the case be continued until he returned, and never, until this collateral attack, suggested that his illness made the waiver involuntary. Even now petitioner offers no specific reasons why his waiver might have been involuntary, but relies instead on the conclusory assertion (Pet. 4) that the waiver was "void."

Under these circumstances, the court of appeals correctly ruled that petitioner's absence from trial was voluntary. Former Rule 43 expressly allowed a defendant in a non-capital case voluntarily to absent himself after the trial had been commenced in his presence,[4] and this Court has long held that there is no Sixth Amendment violation when a defendant voluntarily absents himself from the courtroom during trial.[5] *Taylor* v. *United*

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[3]The waiver read as follows (Pet. App. A 2a, n. 1):

> I, Thomas E. Joyce, defendant herein, hereby waive my presence for the rest of the trial and hereby authorize my attorney, Julius Echeles, to continue to represent me without my presence.

[4]The present Rule 43, effective December 1, 1975, does not limit the voluntary absence rule to trials for crimes other than those punishable by death, and differs from the former rule in other respects as well, none of them having any bearing on this case.

[5]Petitioner points to no prejudice suffered on account of his absence for the last day of trial. Petitioner had rested his case the day before, and so his absence had no effect upon his right to testify on his own behalf. Petitioner missed only the presentation of evidence by two co-defendants, the government's case on rebuttal, and closing arguments; his attorney was present throughout all of these proceedings (Pet. App. A 5a).

States, 414 U.S. 17; *Diaz* v. *United States*, 223 U.S. 442, 454-455.[6]

It it therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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[6]Petitioner's reliance (Pet. 4-5) on *Cureton* v. *United States*, 396 F.2d 671 (C.A.D.C.), is misplaced. As the court of appeals noted (Pet. App. A 3a, n. 3), that case does not conflict with the decision below "because it did not involve a written waiver consenting to continuation of the triai and defense counsel's statement of defendant's desire that the trial continue in his absence."